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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

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Meeting: 1419th meeting (December 2021) (DH)

Reply from the authorities (19/11/2021) following a communication from the applicant in the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. 14305/17).

Information made available under Rule 9.5 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Réponse des autorités (19/11/2021) suite à une communication du requérant relative à l'affaire Selahattin Demirtas c. Turquie (n° 2) (requête n° 14305/17) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

**THE TURKISH GOVERNMENT'S SUBMISSION
IN RESPONSE TO THE RULE 9.1 COMMUNICATION OF
THE APPLICANT'S LAWYERS**

Demirtaş v. Turkey (no. 14305/17)

1. The Turkish authorities would like to make the following explanations in response to the submission of the applicant's lawyer dated 8 November 2021 with respect to the case of *Demirtaş v. Turkey* (no. 14305/17).

2. The Turkish authorities have summarised and submitted detailed and updated information as to the legal grounds for the applicant's current detention in the Communications to the Committee of Ministers ("CM") dated 1 February 2021, 16 February 2021, 17 February 2021, 29 March 2021, 2 July 2021, 29 July 2021, in the action plan dated 1 October 2021 and communication dated 21 October 2021 and 28 October 2021. The Turkish authorities reiterate these explanations in this regard and submit following additional information:

3. As mentioned in previous communications, the applicant's conviction by the Istanbul 26th Assize Court does not fall within the scope of the ECtHR judgment (for detailed information see the action plan dated 1 October 2021, paragraphs 47-63; 71-88). The ECtHR has never examined the judgment in question on points of law, notably the Istanbul Assize Court's 7 September 2018 dated judgment which has been defined as second set of proceedings. In the Grand Chamber's judgment this case was shortly referred to (§290-297) in so far as to determine the time spent in prison as a convict in the sense of Article 5§1(a) of the Convention. Accordingly, the authorities would like to underline that this case itself is not a subject matter of the ongoing supervision process.

4. The applicant lodged an individual application with the Constitutional Court against this final judgment on 10 May 2021 (Appl. No. 2021/19210). The applicant claimed that his right to a fair trial, freedom of expression, right to free elections were violated on account of this judgment. Furthermore, he claimed that the safeguards prescribed under Articles 13 and 14 of the Constitution, notably those specified under the heading of "Restriction of fundamental rights and freedoms" and "Prohibition of abuse of fundamental rights and freedoms" were violated in conjunction with the violations of substantial rights indicated

above. On the same ground, he claimed that Article 18 of the Convention was also violated. The Constitutional Court's examination concerning the application is still underway.

5. Nonetheless, this case was taken into account by the Committee as a final executable judgment. As noted above, the domestic judicial remedies have not been fully consumed yet. Later, the applicant may also lodge an application with the European Court. Therefore, there is no an executable final judgment delivered by the Court on account of Istanbul 26th Assize Court's judgment.

6. In this respect, the authorities would like to note that the Committee should not adopt decisions as to the merits of this case surpassing its mandate outlined by the Convention.

7. On the other hand, the authorities would like to indicate that the execution of applicant's prison sentence has ended.

8. On 26 April 2021 the Court of Cassation upheld the judgment. The applicant began serving the remainder of the sentence imposed on him on 3 May 2021. The date of completion of the prison sentence was set as 3 January 2023.

9. The applicant's lawyers applied to the Istanbul Assize Court to have the days he had spent in pre-trial detention during the criminal proceedings in the Ankara Assize Court deducted from the final sentence imposed in the criminal proceedings in the Istanbul Assize Court on 3 November 2021. This application dealt with by the Edirne execution judgeship, where the applicant is currently held. This court admitted this request and decided that the term spent in detention within the scope of criminal proceedings before the Ankara 22th Assize Court was to be deducted on 15 November 2021.

10. As a consequence, the applicant's prison sentence stemming from Istanbul 26th Assize Court judgment, which is delienated by the Court as the second set of proceedings, has come to an end on 16 November 2021.

11. As a point of principle, the Committee should not have examined an application that was not examined by the Court on points of law, notably the Istanbul Assize Court's judgment, or in other words "second set of proceedings". Furthermore, the Turkish authorities would like to draw the Committee's attention to an important point. The applicant could have requested deduction at the very beginning of the execution process, even on 4 May 2021. In such a case, the execution of the prison sentence would have ended on that date which would have left the questions surrounding the examination of the second set of proceedings by the Committee of Ministers redundant.

12. As a result, the applicant is not currently convicted. He is detained because of the ongoing proceedings before the 22nd Ankara Assize Court. Furthermore, the last hearing was held before the 22nd Ankara Assize Court on 18-27 October 2021. The Assize Court reviewed the applicant's detention in this hearing and decided that his detention to be continued. It has been decided that the next hearing will be held on 8-19 November 2021.

13. The proceedings in relation to the applicant before 22nd Ankara Assize Court are carried out by independent courts and the evidence collected within the scope of this trial is appreciated by the relevant court and the applicant's detention status is evaluated within this scope independently of other proceedings.

14. It is observed from the reasoning of the decision that contrary to the allegations of the applicant's representatives, the decision on the continuation of applicant's detention was based on concrete evidence and justifications. The relevant parts of this decision reads as follows;

“In respect of the previous decisions of our court on the continuation of the detention:

It is seen that, unlike the other accuseds, the lawyers of the accused Selahattin DEMİRTAŞ demanded his release, stating that he should be released immediately in accordance with the decision of the Grand Chamber of the European Court of Human Rights dated 22 December 2020.

In Article 63 of the decision of the Grand Chamber of the European Court of Human Rights dated 22 December 2020 in respect of the accused Selahattin Demirtaş, it is stated that “Following the entry into force of the constitutional amendment concerning the lifting of parliamentary immunity, the Diyarbakır public prosecutor decided to join thirty-one separate criminal investigations in respect of the applicant together as a single case. There are currently seven other sets of criminal proceedings pending against the applicant in the national courts. However, as the investigations and proceedings concerned do not form part of the present application, all references below to “the criminal investigation” will relate to the investigation being conducted by the Diyarbakır public prosecutor’s office.” In other words, as stated in Article 70, it is clearly stated that it concerns exclusively the arrest warrant issued by the 2nd Magistrate Judgeship in respect of the accused Selahattin Demirtaş. Therefore, the arguments that this decision is binding on the detention decision rendered by our court are groundless. The ECtHR has stated this itself. It is clear that the

accused's release took place during the trial conducted by the Ankara 19th Assize Court, where his release was requested, and that the accused was convicted. Indeed, the accused's lawyers applied to the court with a request to deduct the days he spent in detention, which was ordered during the proceedings before the Ankara 19th Assize Court, from the final sentence given at the end of the criminal proceedings carried out at the Istanbul 26th Assize Court. On 20 September 2019, the Istanbul 26th Assize Court accepted this request. The European Court of Human Rights also stated in its decision that there was no dispute on this issue.

In the light of all these explanations, it is not possible to ignore the evidence of our file that emerged after the decision, which was understood to be outside the scope of the review of the Grand Chamber of the European Court of Human Rights. It is considered that Selahattin DEMİRTAŞ was under strong suspicion as to the commission of offence due to the statements of anonymous witness Mahir and witness Kerem Gökalp validating each other concerning that the members of the organization attended the MYK and PM (Central Executive Board and Parliamentary Assembly) meetings as the spokespersons of the KCK Turkey; the content of the message, which was the source of the serious suspicion that the call in question (MYK CALLS) was made upon the instruction of the organisation, which was determined among the digital material of Bircan YORULMAZ and which was understood to be sent by the PYD, the Syrian branch of the PKK, validating the statements of other witnesses; the witness statements saying that the organization acted by indicating the calls made by the MYK as justification in order to force to action and which is understood not to fall within the scope of the examination of the European Court of Human Rights; the investigations statements of the accused Altan TAN; and especially the investigation statement of İbrahim Binici given with the presence of a lawyer where he stated that incidents occurred on 6-8 October 2014 were the incidents of uprising -serhildan- organized by the PKK after the calls.

Accused's lawyers requested that the accused's detention be terminated as required by the “obligation to implement” the decision of the European Court of Human Rights ruling that the accused’s parliamentary immunity was lifted in an unforeseeable way and accordingly the following process should be terminated, that his parliamentary non-liability should be examined independently from his parliamentary immunity and that the call in question was a democratic call. As stated, aside from the fact that the aforementioned decision is not relevant to our file, there is no obstacle to the detention order, since the

accused's membership of parliament ended in 2018 due to the re-election and his not being a candidate again, in other words he did not have the status of member of the parliament and parliamentary immunity at the time of his placement into detention. In terms of parliamentary non-liability, when it is understood that the accused's call, which is the subject matter of the proceedings and has nothing to do with the legislative activity in terms of his parliamentary speeches included in the file, was made through social media and the press outside the parliament, it has been evaluated that it is not within the scope of parliamentary non-liability regulated in Article 83 § 1 of the Constitution. In terms of the claim that the call of the MYK is a democratic call, it has been evaluated that new evidence has emerged and there is no obstacle to take them as the basis for the detention in accordance with the case law of the European Court of Human Rights and the current legislation.

In addition, in the news published on the hurriyet.com.tr with the link <https://www.hurriyet.com.tr/gundem/hdpli-selahattin-demirtas-anne-ve-babasini-ziyaret-etti-28690578>, his family photo was used. After accused Selahattin Demirtaş was reminded that his brother Nurettin Demirtaş was absent in the photo, he made the following expressions concerning his brother's journey: "he was placed in prison when he was a college student. He spent the half of his life in prisons. He wished to participate in democratic politics and he did so, he became a co-chair. They made him someone who cannot do politics by means of the pressure of judiciary. They sentenced him to severe punishments. They filed many cases. We did not want him to spend much more years in prisons. He lives in Erbil now. Not only he but also tens of thousands persons have to live in exile. Each one of them is resentment and wound for me. Not only my brother. He is just one of them. Tens of thousands of persons are separated from their country. They cannot come to their country only due to their thoughts. If we reach a good result after 7 June, we will have important opportunities for solving this problem, for internal peace." Besides it was considered that these statements of the accused concerning his brother raised concrete and reasonable suspicions indicating that in case of his punishment following criminal investigations and proceedings, he would attempt to abscond in order to flee from the punishment, it is observed that the accused declared that "no member of the parliament from HDP will voluntarily testify" during his party's group meeting, that despite the invitation of the authorized public prosecutors during the investigation phase of the joined file to give a statement on 12 July 2016, 15 July 2016, 28 July 2016, 12 August 2016, 6 September 2016 and 11 October 2016, he did not go to a chief public prosecutor's office to give a statement voluntarily, and that during the trial phase, he

refrained twice from giving a defence submission by arguing the court's competence by saying that he wanted the hearing to be postponed to July 2023 after the election, referring to the Presidential and parliamentary elections to be held. In fact, it is clear that questioning the competence of the court is not related to the merits of the proceedings, as the explanations to be made regarding the actions attributed in this sense regarding the content of the claim and defence will be explanations on the merits of the proceedings. The decision of the Constitutional Court in the application of Keleş Öztürk also sheds light on this aspect. The fact that even though within the scope of the obligation to complete the proceedings in a reasonable time, which is imposed on the Contracting States in Article 6 of the European Convention on Human Rights, all the accuseds were provided with the necessary opportunity to reach the information and documents at the hearings and after the hearing for preparation of defence, accused Selahattin Demirtaş requested time for many times and did not submit his defence and that the lawyers presented matters irrelevant from the merits of the case raises suspicions that he might abscond from the proceedings.

Following matters are evaluated within this scope; that accuseds Arife KÖSE, Bayram YILMAZ, Hatice ALTINIŞIK, Yurdusev ÖZSÖKMENLER, Zeynep KARAMAN -the HDP (People's Democratic Party) MYK (Central Executive Board) members- and Demir ÇELİK -member of the parliament- as well as Ertuğrul Kürkçü and Kamuran Yüksek, who are alleged to have taken part in the political structure, are also on the run, that there are a lot of complainants and witnesses in the file, that as can be seen in the section on the statements regarding the perpetrators involved in the above-mentioned events, after the HDP's call, some individuals and children were threatened by members of the PKK/KCK terrorist organization to participate in the said actions under fear and coercion, that considering this matter, there are concrete facts regarding the possibility of attempting to put pressure on witnesses, victims or others in the file of our court and that for example, anonymous witness named "Mercek", whose testimony was included in the indictment as a witness in the file of the Ankara 19th Assize Court with docket no. 2017/189 against accused Selahattin Demirtaş, which was joined together with our file, is still unreachable despite the efforts of the relevant units. In the light of all these evaluations, it is understood that the precautionary measure is necessary since the concrete evidence showing the existence of strong suspicion of offence exists, the measure in question is proportional to the alleged crime, and the provisions of judicial control are considered to be insufficient for the accused in terms of facts that raise

the suspicion that the accused will flee and the accused Selahattin DEMİRTAŞ's detention shall be CONTINUED,"

15. Lastly, the Government would like to reiterate on this issue that the applicant's detention within the scope of the proceeding which constituted the subject-matter of the violation judgment of the Grand Chamber ended 2 September 2019. The applicant's application pending before the ECtHR was different from the Grand Chamber decision in question and was communicated to the Government as a different application.

16. As a point of principle, the Committee should not have examined an application that was not examined by the Court, notably the 22nd Ankara Assize Court's judgment, or in the other words "third set of proceedings". Moreover, the authorities would like to note that the applicant's current detention starting from 20 September 2019 is subject to several applications pending before the Constitutional Court and the European Court. Accordingly, there is no a final decision with respect to the applicant's detention pending trial. The outcome of the proceedings should be awaited.

CONCLUSION

17. The Turkish authorities kindly invite the Committee of Ministers to take into consideration the above-mentioned explanations within the scope of the execution of the *Demirtaş* case.